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Nos. 00-568 & 00-809

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ENRON POWER MARKETING, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF ENRON POWER MARKETING, INC. AS PETITIONER IN NO. 00-809

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INTRODUCTION AND SUMMARY

In Orders No. 888 and 888-A, FERC found that the public utilities that own interstate transmission facilities discriminate, with respect to terms of access and usage, against other suppliers of electricity and in favor of their own transmissions. *See, e.g.*, NOPR at 33,052, Pet App. 566a; Order No. 888 at 31,682, 31,919-26, Pet. App. 214a, 315a-331a; Order No. 888-A at 30,210, Pet. App. 435a; (FERC Br. at 11). Pursuant to its statutory mandate to eliminate undue discrimination, 16 U.S.C. § 824e(a), FERC ordered such utilities to end discrimination between (a) the transmission they provide to competing suppliers and (b) the transmission they provide to themselves for their own (i) wholesale sales and (ii) *un*bundled retail sales. But although FERC concluded that it would be "helpful" also to require such utilities to take transmission service for their *bundled* retail sales on the same nondiscriminatory terms, Order No. 888 at 31,699, Pet. App. 235a, it read the Federal Power Act (FPA) as denying it jurisdiction to do so. It therefore allowed the utilities to continue to discriminate in favor of their own transmissions that account for about 60% of the pertinent usage of the interstate grids. (*See* Enron Pet. Br. at 5.)

The D.C. Circuit upheld FERC's abdication of jurisdiction over transmissions to serve bundled retail sales on the ground that the FPA is ambiguous and therefore the agency is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this Court, FERC urges affirmance primarily on that ground. Respondents New York et al. (New York) and Edison Electric Institute (EEI), the trade association of transmission-owning utilities, argue in addition that FERC jurisdiction over such transmissions would interfere with the traditional authority of the states over retail sales. EEI argues further that in any event there is no discrimination because, it alleges, there is no competition to serve bundled retail customers. All of these arguments are wrong.

Preliminarily, four important points are not open to serious dispute. First, "transmission" of electric energy at high voltage over a grid is distinct, as both a physical matter and a statutory matter, from "distribution" at low voltage over radial electric lines. (*See* Enron Resp. Br. in No. 00-568, at 28-32; FERC Br. at 30-34; Transmission Access Policy Study Group (TAPS) Br. at 21-24; Electrical Engineers et al. (Experts) Br. at 26.) Second, transmission is exactly the same, and uses the grid in the same way, regardless of whether the transmitted energy is sold on a bundled or unbundled basis. (*See* Enron Pet. Br. at 4-5, 30-31; Experts Br. at 2, 8-11, 14-17.) Third, section 201 of the FPA, 16 U.S.C. § 824(b), gives FERC "jurisdiction over public utilities' transmission of energy in interstate commerce 'without qualification.'" (FERC Br. at 13; *see also* Enron Pet. Br. at 21-27.) Fourth, except for some transmissions within Texas, virtually all electric transmission within the contiguous United States is "in interstate commerce" because (a) every transmission over an electric grid uses the entire grid (*see* FERC Br. at 27; TAPS Br. at 27-30; Experts Br. at 2-3, 10-11, 16-17), and (b) today (although this was not true in 1935) all non-Texas transmission lines are interconnected. (*See* Enron Pet. Br. at 9, 28; FERC Br. at 4-5, 25-27; Experts Br. at 2-3, 19, 30.)

FERC's argument that there is an "ambiguity" with respect to FERC's jurisdiction is not based on the language of section 201(b)(1) regarding transmission. FERC concedes that this provision would, standing alone, grant jurisdiction over all transmission in interstate commerce. (*See* FERC Br. at 28-29, 45.) FERC contends that ambiguity is created by the Act's separate confirmation of state jurisdiction over retail *sales* of electric energy. New York and EEI go further, arguing that FERC jurisdiction over interstate transmission, if construed to reach transmissions that serve bundled retail sales, would interfere with authority Congress left to the states.

There is no ambiguity and no interference, as this Court has already held in interpreting the parallel provisions of the

Natural Gas Act. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 637-38 (1972) (*LP&L*). Interstate transmission, like interstate transportation of natural gas, is *both* a federally regulated activity *and* a component of bundled retail service whose cost is factored into state-regulated retail rates. Federal regulation of such transmission is perfectly compatible with plenary state regulation of retail sales, just like federal regulation of railroad charges for carrying coal to a utility's generators or federal regulation of the communications charges the utility incurs in doing business. The rights of the states to decide who may serve their retail customers and to dictate the terms and quality of that service are not challenged by anyone and not at issue.

This case is not, however, solely or primarily about the price charged for transmission: it is about fair and nondiscriminatory access to and usage of the interstate grids,[1] based on a published tariff that sets forth rules of access, procedures for scheduling and information sharing, rules for curtailment in periods of system constraint, and similar matters. (*See* TAPS Br. at 31-38 (describing the "inherent[ ] unworkab[ility]" of state regulation, and necessity for federal regulation, of the interstate grids).) Respondents argue that because bundled retail customers normally have no choice of supplier, there is no competition, hence no discrimination,

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[1] As amicus Pennsylvania Public Utility Commission points out (Br. at 7):

> New York[ ] . . . erroneously conflates State ratemaking powers with rules controlling the operation of the interstate transmission network. Transmission rates are actually a relatively small component of retail electric rates. It is clear from New York's argument (and even more so from the novel theory advanced by California . . .) that retail rates are not the issue here. Network control and 'rules of the road' are what is being fought over. Who controls the interstate grid gets to decide a great many things, including wholesale generation market design and which wholesale electricity transactions will flow and which will be cut or reduced.

and hence no need for any regulation of interstate transmission other than whatever review of transmission costs a state chooses to conduct in connection with retail ratemaking. But all transmission competes for access to the interstate grids, whether the ultimate retail sale is unbundled or bundled and, as FERC has recognized, a transmission owner unduly discriminates when it treats other transmission users less favorably than it treats itself, whether or not they are competing for the same energy customer. *See American Elec. Power Serv. Corp.*, 64 F.E.R.C. ¶ 61,279 (1993). Moreover, utilities that serve bundled retail customers do compete with other suppliers for various important classes of customers (e.g., municipalities, cooperatives, large industrial customers) and their ability to provide themselves with superior transmission stifles that competition.

FERC's decision to abdicate its jurisdiction over transmissions whose cost is bundled with retail sales of energy leaves a regulatory vacuum that all but invites interstate conflict. Users in every contiguous state depend on the interstate transmission grids, including the portions that lie in other states, to receive electricity from close and distant generators. Current events vividly demonstrate that capacity on those grids is often short. The open access regime was intended as a uniform set of rules for allocating that capacity fairly. But as some states (*see* PA Br. at 3-4, 15) have recognized, FERC, by disclaiming jurisdiction, has permitted a state to circumvent true open access, and beggar its neighbors, by asserting a superior claim to the in-state portion of the interstate grid capacity for *its* bundled retail customers, making that capacity unavailable for other states' through transmissions. One court of appeals has explicitly allowed this to happen. *See Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000). No state can protect itself from its neighbors' selfish use of "their" parts of the grid, because no state has jurisdiction to regulate the out-of-state portions of interstate lines. FERC's

abdication threatens the nationwide markets for power that Congress sought to build.

ARGUMENT

I. THE FEDERAL POWER ACT GRANTS FERC JURISDICTION OVER ALL TRANSMISSION OF ELECTRIC ENERGY IN INTERSTATE COMMERCE, INCLUDING TRANSMISSIONS WHOSE COST IS BUNDLED INTO A RETAIL SALES CHARGE.

A. The FPA Is Not Ambiguous with Respect to FERC's Jurisdiction over Interstate Transmission.

The D.C. Circuit ruled, and FERC argues in this Court, that the FPA is ambiguous and that FERC's determination that it lacked jurisdiction over transmissions bundled with retail sales is therefore entitled to deference. But the relevant provision of the FPA is not ambiguous, and the agency and courts are bound by what it plainly says. *See Chevron*, 467 U.S. at 842-43.

Section 201(b) gives FERC jurisdiction over "the transmission of electric energy in interstate commerce . . . ." 16 U.S.C. § 824(b). As FERC recognizes (*see* Br. at 45), there is no stated qualification or limitation based on the terms of the ensuing sale or on anything else. *Cf. LP&L*, 406 U.S. at 637-38 (finding no limitation in the parallel NGA provision). Instead, FERC argues that an ambiguity is created, leaving room for FERC interpretation, because "[s]ection 201(b) also assigns the states jurisdiction over 'any . . . sale of electric energy' that is not 'at wholesale in interstate commerce.'" (Br. at 45.)

But there is no conflict between the two parts of section 201(b), and there is no ambiguity for FERC to resolve. The terms of transmission in interstate commerce, including all aspects of access to and usage of the interstate grids, are explicitly subject to FERC jurisdiction. The cost of transmis-

sion is one of a number of component costs incurred by a retail utility that are clearly subject to federal regulation (including the cost of power purchased at wholesale). Such federal regulation does not usurp any state regulatory power, including the states' right to regulate the retail price of electricity. It simply means that if a state regulator chooses to use cost-based rate-setting, then it must take a utility's federally determined costs into account in setting a final price. *Cf. Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

EEI asserts that, in the case of bundled retail sales, interstate transmission becomes an "inseparable" part of the retail "sale of electric energy." (Br. at 38.) But transmission and the sale of energy are no more "inseparable" (in the sense of being impossible to regulate separately) than the (federally regulated) cost of transporting a good to market and the (state regulated) act of selling it. Bundling does not turn the transmission into a sale, and transmission uses the grids the same way, regardless of how its cost is reflected on the end user's power bill. The very word "bundling" implies that different things—here generation, transmission, and delivery—are wrapped together for purposes of sale.[2]

EEI adds (*see id.* at 38) that since section 201(b) unambiguously gives FERC jurisdiction over wholesale sales in interstate commerce, the additional language confirming state jurisdiction over "any other sale of electric energy" must be interpreted to mean "the *transmission* of energy for retail sale," because otherwise the "any other sale" language would be superfluous. As it happens, this Court has already rejected

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[2] EEI contradicts its own argument by conceding that, even when transmission is bundled with the retail sale of energy, FERC retains jurisdiction to review the utility's "'set aside' for bundled retail service (i.e., for 'native load'), to ensure that utilities do not arbitrarily withhold transmission capacity from the open access market." (Br. at 48; *see also* NY Br. at 18 (conceding that FERC has jurisdiction to "limit[ ] the ability of a utility to reserve transmission capacity for native load to levels needed to accommodate reasonable growth") (citations omitted).)

this remarkable argument. Interpreting the parallel language in the NGA, the Court determined that Congress was simply adding belt to suspenders:

> It is well established that the proviso [to section 1(b) of the Natural Gas Act, denying the FPC jurisdiction over "any other . . . sale of natural gas"] was added to the Act merely for clarification and was not intended to deprive FPC of any jurisdiction otherwise granted by § 1(b). The House report on the bill described this second sentence of § 1(b) as follows: "The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill."

LP&L, 406 U.S. at 637-38 n.14 (quoting H.R. Rep. No. 75-709, at 3 (1937)).

FERC argues (*see* Br. at 46) that the "legislative history of the FPA is inconclusive," but legislative history—in particular "inconclusive" legislative history—cannot make a clear statute ambiguous. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Moreover, the legislative history that FERC, New York, and EEI cite does not suggest any ambiguity. All three respondents point to language preserving "the authority of States to fix local rates." (FERC Br. at 46; NY Br. at 8; EEI Br. at 39 n.30.) But this state authority does not obscure FERC's authority to regulate interstate transmission any more than it obscures FERC's authority to regulate wholesale sales. As Enron showed in its opening brief (Br. at 23-25), the legislative history of the FPA in fact supports FERC jurisdiction over all interstate transmission, wholesale or retail, bundled or unbundled. FERC's and New York's unsuccessful attempts to answer this showing (*see*

FERC Br. at 46; NY Br. at 7-12) misread statements in the legislative history about retail sales as if they were discussing transmission and, in the case of New York, confuse transmission with distribution (*see* NY Br. at 11).

Finally, contrary to respondents' arguments, this Court's decision in *LP&L* is directly on point. At issue in *LP&L* was FERC's jurisdiction to include bundled retail sales of natural gas in FPC-ordered curtailment plans during periods of short supply. The Court held that section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. § 717(b), which parallels and is nearly identical to section 201(b) of the FPA, granted FERC jurisdiction over the transportation of natural gas, even when transportation was bundled with a retail sale. 406 U.S. at 636-37.

FERC acknowledges that *LP&L* "confirms that the Commission's jurisdiction over interstate transmission is in addition to, and is not limited by, its jurisdiction over wholesale sales." (Br. at 19-20; *see also id.* at 28-29.) But FERC later, inconsistently, describes the pertinent holding of *LP&L* as limited to "federal curtailment requirements." (*Id.* at 46-47.) The latter description is wrong: *LP&L* suggests no such limitation and, perhaps more important, curtailment rules—a key feature of rules ensuring equal access to the grids—are close to the heart of this case. *See infra* pp. 19-20.

FERC argues further that *LP&L* is distinguishable on the grounds that (a) the federal curtailment requirements in *LP&L* addressed transportation and did not affect retail rate-setting, and (b) regulation of interstate transportation in *LP&L* was necessary to prevent conflicts among the states. (*See* FERC Br. at 37.) But similar conditions obtain here: the OATT addresses interstate transmission, not retail rate-making, and its indirect effect on retail rates is not qualitatively different from the potential indirect effect of the regulations at issue in *LP&L*. And, as further discussed at pp. 17-19, *infra*, the absence of federal regulation of important inter-

state transmission will create jurisdictional gaps and make state conflicts almost inevitable.

EEI's attempts to explain away *LP&L* also fail. EEI's first answer to *LP&L* is that the Court's practice of citing the FPA and NGA interchangeably does not apply to the jurisdictional provisions. (*See* EEI Br. at 42.) EEI is simply wrong. In *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964), for example, the Court held that its review of the FPA's jurisdictional grants in section 201(b) did not proceed "on a clean slate. . . . The Natural Gas Act grew out of the same judicial history as did the part of the [FPA] with which we are here concerned; and § 201(b) of the Power Act has its counterpart in § 1(b) of the Gas Act . . . ."). *Id.* at 211-12.[3]

EEI also argues that *LP&L* is distinguishable because, EEI asserts, it dealt with section 7(c) of the NGA, a provision with no FPA parallel, which requires natural gas companies to obtain FPC certificates of public convenience before transporting natural gas, 15 U.S.C. § 717f(c). But this Court's confirmation of FPC jurisdiction over all natural gas transportation did not rest on section 7(c), and there is no indication that the Court believed that section 7(c) augmented that jurisdiction. The Court expressly rejected the lower court's holding that FERC must have been acting under its section 7 authority because it lacked jurisdiction under section 1(b), holding instead that the FPC acted under its authority in sections 1(b) and 4. *See LP&L*, 406 U.S. at 643-46.[4]

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[3] *See also United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 310-11 (1953) (noting that NGA precedent "would be as applicable here [interpreting FPA § 201(b)] as to § 1(b) of the [NGA]").

[4] EEI also argues that the NGA precedent is inapposite because the natural gas industry was not characterized by vertically integrated entities, as the electric industry is. But EEI greatly exaggerates. Before the complete unbundling of the gas industry pursuant to FERC Order No. 636, 57 Fed. Reg. 13,267 (Apr. 16, 1992), there had always been significant vertical integration of gas pipelines with both gas production and distribution. *See, e.g., Maryland People's Counsel v. FERC*, 761 F.2d 768, 775 (D.C. Cir. 1985) ("Most, if not all, major gas pipelines . . . are

B. Application of the OATT to Interstate Transmissions Bundled with Retail Sales Is Consistent with the Federal/State Regulatory Scheme of the FPA and Does Not Interfere with Traditional State Regulation.

The general problem addressed in Orders No. 888 and 888-A is relatively new. In the era when vertically integrated utilities, mostly confined to single states, served almost all retail customers on a state-regulated monopoly basis, the problem of competitive access to and usage of the interstate grids was presented only in unusual situations. *See* Order No. 888 at 31,639-47, Pet. App. 140a-161a; (TAPS Br. at 4, 38-41.) The need for general open, nondiscriminatory access arose in the early 1990s, when new federal legislation led to widespread interstate competition to supply electric energy and the new suppliers, lacking transmission facilities, needed access to the facilities owned by the traditional utilities in order to bring electricity into the states where it was needed. *See* Order No. 888 at 31,639-47, 31,651-52, Pet. App. 140a-161a, 170a-172a; (Enron Pet. Br. at 9-11; FERC Br. at 9-12).

This newly acknowledged problem was one that the states had not previously regulated. Traditional state regulation of bundled retail sales did not purport to regulate the

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'backward vertically integrated'—that is, they own significant gas exploration, development and production affiliates.") (citations omitted). And just as in the electric industry, FERC found that the gas pipelines had an incentive to, and did, discriminate in favor of their own and affiliated gas production. *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, Order No. 636-A, [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,950, at 30,542 (1992) ("major purpose of the Commission in adopting Order No. 636 is to design rules to counter th[e] economic incentive to discriminate in favor of a pipeline's own bundled sales service") (citation omitted), *aff'd in relevant part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105, 1125 (D.C. Cir. 1996) (upholding mandatory unbundling to prevent pipelines from providing superior transportation to their own bundled gas sales).

transmission of electric energy across state lines. What EEI describes (Br. at 36) as "five or more decades" of "state commissions . . . asserting jurisdiction over the transmission aspect of such sales" has consisted of state authorities taking transmission costs into account when determining retail rates and imposing service level requirements for their own local customers. (*See* FERC Br. at 46-47.) Application of the OATT to transmissions of energy for bundled retail sale would not displace state regulation: the states would simply continue to take transmission costs (although now subject to the OATT) into account when determining retail rates.[5]

But, more important, the OATT is not primarily about rates at all: it is about setting uniform rules for access to and usage of the interstate grids. As such, the OATT is qualitatively unlike anything any state has ever done or could ever do; it is simply inconceivable that open access could be achieved other than by a federal agency imposing compatible terms on all owners of the facilities that together make up the grids. (*See* TAPS Br. at 31-38.)[6] State commissions have no authority or incentive to impose nondiscriminatory conditions for competitive access to the interstate grids by out of state suppliers servicing out of state users, *see, e.g.*, *Public*

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[5] Contrary to New York's argument (Br. at 6), FPA section 206(d), 16 U.S.C. § 824e(d), which gives FERC authority to investigate and "determine" the cost of interstate transmission "in cases where [FERC] has no authority to establish a rate governing the sale of [the] energy," supports Enron's position: it provides that, even where there is a bundled retail sale, FERC may, on its own motion, decide the costs of interstate transmission.

[6] EEI argues (Br. at 41) that applying the OATT to transmissions bundled with retail sales would impose "a huge regulatory burden and uncertainty on the industry." But as FERC notes (Br. at 43 (citing *FPC v. Conway Corp.*, 426 U.S. 271, 280 & nn.6, 7 (1976)), "the resulting accounting issues would be commonplace." Utilities providing bundled service regularly need to account separately for federally regulated and state-regulated costs. And of course the fact that electric service is unbundled in many states (*see* EEI Br. at 11 n.6) means that the OATT is already broadly applicable to utilities that sell at retail in such states.

Utilities Comm'n of Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927); *LP&L*, 406 U.S. at 633-36 (noting that conflicting interests among states preclude workable state regulation of interstate natural gas transportation).

Finally, New York and EEI argue (*see* NY Br. at 7, 16; EEI Br. at 40-41) that Enron is attempting to compel FERC to violate FPA section 212(h), 16 U.S.C. § 824k(h), which bars FERC from "requir[ing] the transmission of electric energy . . . directly to an ultimate consumer." But Enron is arguing only that FERC has jurisdiction over transmission in which a utility in fact engages, and that FERC must use that authority to eliminate undue discrimination between users of interstate transmission facilities. Neither FERC nor Enron contemplates giving FERC authority to order direct transmission to an ultimate consumer. *See, e.g.*, Order No. 888 at 31,781, Pet. App. 306a-307a. The significance of section 212(h) for this case is that its express limitation, barring FERC from ordering transmission to retail customers, would be meaningless if, as New York contends, FERC's jurisdiction over interstate transmission extended only to transmissions supporting wholesales.

II. TRANSMISSION-OWNING UTILITIES CAN AND DO DISCRIMINATE AGAINST COMPETING USERS OF TRANSMISSION SERVICE, AND FERC'S FAILURE TO ADDRESS THIS DISCRIMINATION WAS UNLAWFUL.

In the orders under review, FERC found that the "vast majority" of vertically integrated utilities "historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales," Order No. 888-A at 30,210, Pet. App. 436a-437a, and that "[t]he *only* way . . . to remedy [such] discrimination is through readily available, nondiscriminatory transmission access," *id.* at 30,176, Pet. App. 382a (emphasis added). These findings made no distinction between transmissions for bundled and unbundled retail

sales; on the contrary, the orders find that "all" transmission must be subject to open access if consumers are to realize the benefits of supply competition. *See* Order No. 888 at 31,635, Pet. App. 133a. But even though FERC acknowledged it has a "statutory obligation under sections 205 and 206 of the Federal Power Act" to remedy undue discrimination, *id.*, it simply shrugged that task off with respect to the majority of transmissions on the interstate grids: without explanation or citation to the record, FERC declared that it was "not . . . necessary" to apply the OATT to transmissions where the ensuing sale is bundled retail. *Id.* at 31,699, Pet. App. 235a. The result is a serious regulatory gap.

A. EEI's Argument that There Can Be No Undue Discrimination with Respect to Transmissions Bundled with Retail Sales Is Wrong as a Matter of Both Law and Fact.

EEI suggests (Br. at 46-47) that there can be no "undue discrimination" within the meaning of sections 205 and 206 because (it asserts) alternative suppliers do not compete with vertically integrated utilities for their bundled-service retail customers, and the unbundled-service customers for whom the new entrants compete are not "similarly situated" to the transmission monopolists' bundled native load. This is wrong on both the law and the facts.

First, although EEI attributes to FERC the suggestion that "undue discrimination" can exist only as between similarly situated retail customers (*see id.* at 47), the agency has specifically rejected that narrow conception of discrimination. As FERC noted in Order No. 888, the development of competition after the EPAct required the agency to "broaden[] its undue discrimination analysis (which traditionally had focused on the rates, terms, and conditions faced by similarly situated third-party customers) to include a focus on the rates, terms, and conditions of a utility's own uses of the transmission system." Pet. App. 160a-161a. Transmission monopolists and other suppliers do compete head-to-

head for capacity on the interstate grids, even when they are using that capacity to serve different classes of customers, or customers in different states. For that reason, FERC held, an "open access tariff that is not unduly discriminatory or anti-competitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system." Pet. App. 161a (quoting *American Elec. Power Serv. Corp.*, 67 F.E.R.C. ¶ 61,317, at 61,490 (1994)).

Second, EEI's factual premise—that vertically integrated utilities and other suppliers do not compete for the same customers—is incorrect. Even in a "bundled" state, suppliers compete to serve categories of large customers that have a choice to be part of the franchised utility's native load or use an alternative power source. These customers include municipalities,[7] and large industrial users that can build their own on-premises generators or exercise "buy through" rights permitting them, as part of an economic development package, to by-pass their local distribution monopoly and access competitive power suppliers. Such customers remain dependent on the franchised utility's transmission for delivery or back-up service, and the franchised utility can deter the customer from leaving by threatening to favor its own customers and withhold transmission or curtail access for others in times of constrained capacity. *See, e.g.*, Order No. 888 at 31,921, Pet. App. 320a (noting instances where vertically integrated utilities punished "prodigal [*sic*] customers" by withholding needed transmission).

Moreover, other suppliers compete directly with transmission monopolists for the same *wholesale* customers in "bundled" states, and FERC's failure to extend open access to bundled retail load impedes that competition. For example, Enron often competes with a vertically integrated utility

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[7] *See, e.g.*, Order No. 888 at 31,920, 31,923-25, Pet. App. 316a-319a, 324a-330a (examples involving AMP-Ohio and various California municipalities).

to sell electricity to other, neighboring utilities, and to do so Enron's only, or most economical, transmission may be through the first utility's bundled-service territory. The exemption from open access for transmissions to serve bundled customers gives that utility an effective chokehold over Enron's "through" transmission: Specifically, that utility can tie-up for native load some or all of its incoming transmission capacity, thereby denying Enron "through" service or forcing Enron to schedule around the utility's bundled service territory. Order No. 888 cites several examples of strategic tying-up of transmission capacity, nominally for bundled transmissions, in order to block access by competing sellers. *See, e.g., id.* at 31,920, 31,923-24, Pet. App. 317a-318a, 325a-328a (examples of utilities manipulating reservation of transmission capacity to discourage competition).

EEI's suggestion (*see* Br. at 47-48) that the exemption from open access for bundled transmission can somehow be justified as a protection for residential customers that cannot choose their suppliers inadvertently proves Enron's point. A state might *want* to give its own residents transmission priority over wholesale purchasers, but it does not and should not have jurisdiction to do so. On the contrary, the disadvantaged wholesale customers often are other utilities or municipalities with their own residential customers to serve; denying them equal access simply shifts the burden from residential users in one state to residential users in another.[8]

B. FERC's Arguments that Coverage of Transmission for Bundled Service Is Not "Necessary" Are Also Unavailing.

FERC suggests (Br. at 47) that its failure to extend open access to bundled transmission was actually a reasoned determination based on the state of the factual record then be-

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[8] EEI's justification for distinguishing bundled from unbundled transmission service is not one that FERC ever invoked itself. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

fore it. The portions of the orders FERC cites demonstrate otherwise. The *entirety* of Order No. 888's analysis of the factual record on "necessity" reads as follows:

> Although the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, we do not believe it is necessary.

Pet. App. 235a. FERC's other citation to its purported analysis of the factual record is simply the rehearing order's recitation of what the agency said the first time. *See* Pet App. 453a-454a. The claim that these passages represent a reasoned judgment that the factual record did not support an extension of open access is a considerable stretch.

In fact, as demonstrated above and in Enron's opening brief (*see* Pet. Br. at 12-13, 36-38), Order No. 888 contains detailed findings of pervasive undue discrimination by vertically integrated utilities providing bundled service to their native loads, and none of these findings suggests that the prevalence or impact of discrimination turns on how the transmission is invoiced to the retail customer.[9] On the contrary, Order No. 888 proclaims that extending open access to bundled transmission would be "helpful" in stopping the discrimination that FERC had found. Pet. App. 235a. FERC's Notice of Proposed Rulemaking recognized that limiting open access to unbundled transmission would "result in service under two separate arrangements—an explicit wholesale transmission tariff filed at the Commission and an implicit retail transmission tariff governed by a state regulatory body," presenting the risk that "the quality of transmission service for retail purposes will be superior to the quality of transmission service offered for wholesale purposes." Order No. 888-A at 33,081-82, Pet. App. 634a. FERC expressly "s[ought] comment on how this bifurcated approach would

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[9] In fact, because there was little or no unbundling prior to Order No. 888, all of FERC's findings of undue discrimination occurred in bundled states.

affect the public utility's incentives to provide non-discriminatory open access wholesale transmission service," *id.* at 635a, and the comments Enron and other parties filed provided ample justification for extending open access to bundled transmission.[10]

FERC's suggestion (Br. at 47) that Enron has never established the need for a *federal* role with respect to bundled transmission, or demonstrated the practical limitations of state regulation, is wrong. Enron made such a showing throughout the administrative proceeding.[11] It is evident that where a transmission line crosses state boundaries, the states through which that line passes cannot each adopt a rule giving its own bundled in-state customers priority rights to use the line's capacity. As the Pennsylvania PUC emphasizes, "[a]n interstate transmission system riddled with 'holes' or 'blockades' created by the erection of local State rules seeking to protect 'native' bundled retail load would be injurious to interstate commerce, retail competition, regional reliability and at odds with Congressional intent." (Br. at 3; *see also id.* at 12-13.) Current events in the West are demonstrating that the competitive energy supply markets Congress created are

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[10] Enron participated in the Order No. 888 rulemaking as a member of the Coalition for a Competitive Electric Market, which submitted comments advocating extension of the OATT to bundled retail transmissions. *See, e.g., Initial Comments of The Coalition for a Competitive Electric Market*, Nos. RM95-8-000 et al. (July 12, 1995) (*CCEM Initial Comments*) at 10 ("ineluctably discrimination will persist until there is a total unbundling and consumers of all transmission services, wholesale and retail, take service pursuant to a tariff at posted rates"); *id.* at 4-10; *see also Comments of the Transmission Access Policy Study Group On Major Policy Issues*, Nos. RM95-8-000 et al. (Aug. 7, 1995) at 12, 27-30; *Request for Clarification and Rehearing of the Transmission Access Policy Study Group and Certain of Its Members*, Nos. RM95-8-000 et al. (May 24, 1996) at 8-13.

[11] *CCEM Initial Comments* at 5-6, 13; *see also Comments of the Transmission Access Policy Study Group on Basic Assumptions*, Nos. RM95-8-000 et al. (May 24, 1996) at 2 ("a working infrastructure for a market must be established by [FERC]").

regional and national; they are also demonstrating that individual states face powerful pressures in times of shortage to hoard supply for in-state uses and to prevent the transfer of electricity across state lines. As this Court recognized well before any state had implemented retail unbundling, the "transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citations omitted). FERC is the only entity capable of adopting consistent regulations and safeguarding the national interest.[12]

FERC also (inadvertently) acknowledges, in its discussion of unbundled transmission, the inherent limitations on state power that create a regulatory gap applicable to bundled transmissions as well. FERC explains (Br. at 38) that if a retail customer's state has sole jurisdiction to regulate transmissions to serve that customer, then no authority, federal or state, can regulate transmission service through "intervening" states whose facilities are part of the grid that connect the generator and the customer:

> If the State in which the retail customer is located has jurisdiction to regulate all unbundled transmission associated with a retail sale, there would be a

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[12] New York's lengthy recitation of state-law analogues to the antidiscrimination provisions of the FPA and case law thereunder (*see* NY Br. at 19-23) proves nothing; as New York describes these cases, none involves protection of an out-of-state electric supplier against discriminatory reservations of capacity for in-state customers of in-state utilities. New York does not explain how it could impose consistent usage rules for the out-of-state portions of multistate transmission lines. And even taking New York at its word that it stands ready to police discrimination against out-of-state grid users, there is no guarantee other states will do likewise. Just the opposite: California has filed a brief in this case defending its claimed power to discriminate in favor of in-state users when there is a shortage of transmission capacity. (*See* Cal. Br. at 29.)

> large regulatory gap when the retail customer purchases power from a supplier in a distant State, and that supplier requires transmission service from intervening out-of-state utilities to deliver the power. The intervening transmission would be beyond the jurisdictional reach of the consumer's State . . . [and] would not be subject to meaningful regulation.

FERC means to be answering New York's contention that the states, not FERC, have jurisdiction over transmission to serve unbundled retail customers, but the point applies equally to transmission that serves bundled retail customers: absent FERC jurisdiction there can be *no* effective regulation of such transmission insofar as it implicates facilities in states other than the state of the retail customer. And FERC cannot fully protect the choices of retail customers in unbundled states if it cannot fully regulate the portions of the interstate grid that lie in "intervening" bundled states. (*See* TAPS Br. at 31-38.)

FERC seeks to reassure the Court that it can, in fact, police discrimination with respect to bundled transmission. (*See* Br. at 48; *see also* EEI Br. at 48-49.) FERC points to a later order (Order No. 2000) authorizing the creation of independent "regional transmission organizations" that would operate each grid in place of the vertically integrated utilities (*see* Br. at 47-48 n.23). But the formation of such organizations is entirely voluntary, *see* FERC Order No. 2000, 65 Fed. Reg. 810, 831-35 (Jan. 6, 2000), and one would not expect that the current monopolists—whose "inherent" incentives, FERC found, "make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors," Order No. 888 at 31,682, Pet. App. 214a—would willingly give up their strategic control over the transmission grids. FERC also states that it "continues to believe" it has full authority to prevent transmission monopolists from providing bundled transmission in a manner that disadvantages unbundled services subject to its jurisdiction. But in one of

the critical situations—the determination of whether a utility can favor its own bundled service when system conditions require curtailment of transmission—the Eighth Circuit, following FERC's own reasoning here, held otherwise. *See Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999) (*NSP*), *cert denied*, 528 U.S. 1182 (2000).[13] FERC's unlawful abdication of its jurisdiction prevents it from playing the role that its own findings show is necessary.

CONCLUSION

The decision of the court of appeals sustaining FERC's abdication of jurisdiction over interstate electric transmission for bundled retail sales should be reversed.

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[13] For the same reason, EEI's suggestion that in a curtailment situation "customers under the Order No. 888 open access tariff must receive the same degree of firmness as the utility's native load" rings hollow: this was the very requirement of Order No. 888 that the Eighth Circuit overturned on the basis of FERC's erroneous conclusion that it lacks jurisdiction over bundled transmissions. *NSP*, 176 F.3d at 1096 (overturning Order No. 888 requirement that firm transmission service to third parties be just as firm as bundled transmission to native load). Nor does FERC's limited ability to investigate vertically integrated utilities' purported reservations of transmission capacity for native load in individual cases, many months after the damage to competitors is done in the marketplace (*see* EEI Br. at 48-49), substitute for a self-enforcing structural remedy like the OATT, assuming that the ability to investigate even survives *NSP*.

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